UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE: PHENYLPROPANOLAMINE (PPA) PRODUCTS LIABILITY LITIGATION.	MDL Docket No. 1407 FIRST AMENDED COMPLAINT

This document relates to:

NANCY LEE MONTGOMERY and LOUIS D. MONTGOMERY, Plaintiffs, vs. RITE AID CORPORATION, et al., Defendants.	CASE NUMBER: cv03-0845 CV 03 00845 #00000013

FIRST AMENDED COMPLAINT

Now come the Plaintiffs, by and through their undersigned attorney, and amend their Complaint to add a Defendant, Alpharma In all other respects, Plaintiffs adopt their Original Complaint.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this matter pursuant to 28 U S C Section 1332, for diversity of citizenship and Plaintiff claims an amount in controversy exceeding $75,000 00

PARTIES

1 Plaintiff, Nancy Lee Montgomery, is over the age of 19 years, and is a citizen of Moss Point, Jackson County, Mississippi Plaintiff, Nancy Lee Montgomery suffered a ruptured aneurysm and subarachnoid hemorrhage on December 20, 2000, within 12 hours of taking Rite Aid Cold & Cough DM Elixir

2 Plaintiff, Louis D. Montgomery, is over the age of 19 years, and is a citizen of Moss Point, Jackson County, Mississippi Plaintiff Louis D Montgomery is, and was at all times relevant hereto, the spouse of Plaintiff, Nancy Lee Montgomery

3 The defendant, Rite Aid Corporation ("Rite-Aid") is a corporation of the state of Delaware, with its principal place of business in Pennsylvania At all relevant times herein, Rite-Aid was in the business of promoting, selling, advertising, marketing and distributing products containing Phenylpropanolamine ("PPA") The Defendant does business in Mississippi and at all relevant times hereto, marketed, promoted, warranted and sold its products containing PPA in Mississippi

4 Defendant, Alpharma, Inc is a corporation of the state of Delaware, with its principal place of business in New Jersey At all times relevant here, Alpharma was in the business of promoting, selling, advertising, marketing and distributing products containing Phenylpropanolamine ("PPA"). The Defendant does business in Mississippi and at all times relevant hereto, marketed, promoted, warranted and sold its products containing PPA in Mississippi

5 Defendant, Alpharma, Inc. manufactured and distributed the Rite Aid Cold & Cough DM Elixir containing Phenylpropanolamine ("PPA")

6. Fictitiously described defendant "A", whose identity is unknown to the Plaintiffs at this time, or if the name is known to Plaintiffs, the identity as proper party is not known to the Plaintiffs at this time, and the true names will be substituted by amendment when ascertained At all times relevant hereto, the defendant A was in the business of designing, promoting, testing, researching and developing, manufacturing and distributing Rite Aid Cold & Cough DM Elixir containing Phenylpropanolamine ("PPA") The defendant did business in Mississippi and

at all relevant times hereto, marketed, manufactured, promoted, warranted and sold Rite Aid Cold & Cough DM Elixir products containing PPA in Mississippi

FACTS

7. At all times material to this action, the defendants engaged in the design, manufacture, testing, research and development, marketing, advertising, distribution and sales of non-prescription, pharmaceutical products, including cold, flu, and sinus products containing PPA. The defendants designed, tested, researched and developed, manufactured, marketed, advertised, distributed and/or sold Rite Aid Cough and Cold DM Elixir products containing PPA, which were ingested by Plaintiff

8 At all times material to this action, the defendants have known or should have known that PPA can cause severe hypertension and vasoconstriction of small blood vessels, which can lead to serious, life threatening consequences, including hypertension, seizure, heart attack, hypertensive encephalopathy, agitation, psychosis, hemorrhagic stroke, ischemic stroke, neurological problems and symptoms, cardiac problems, and death Despite this knowledge, for years, the defendants used PPA in many non-prescriptions, over-the-counter medications The defendants marketed and advertised their products to the general public and to the medical community as being safe and effective for their stated purposes.

9. The defendants knew or should have known that the general public considered over-the-counter medications, like the Rite Aid Cough and Cold DM Elixir products to be innocuous and safe to use without the supervision of a doctor because they could be purchased and used without a prescription

10 The defendant, Rite Aid, voluntarily withdrew all its PPA products from the market on November 6, 2000, in response to a request from the Food and Drug Administration to do so

11 Throughout the time period that the defendants manufactured, distributed, marketed and sold products containing PPA, they had been aware of the health risk and adverse effects of PPA The defendants have concealed this information from Plaintiffs and from the general public Plaintiffs did not discover and could not have discovered this information until the voluntary withdrawal of PPA medications at the recommendation of the Food and Drug Administration Because of the intentional conduct of the defendants and the pharmaceutical industry in general to conceal important information about the dangerous risks of PPA medications, the information was not known to Plaintiffs Plaintiffs have just now learned of some of these risks

COUNT ONE

Miss. Code Ann. § 11-1-63

12. Plaintiffs adopt and incorporate by reference all the above allegations

13 At all times material hereto, the defendants have engaged in the business of selling, distributing, manufacturing, marketing and promoting Rite Aid Cough and Cold DM Elixir, which contained PPA, an ingredient that is unreasonably dangerous, and therefore defective.

14 At the time the Rite Aid Cough and Cold DM Elixir left the control of the defendants, and at all times material hereto, the Rite Aid Cough and Cold DM Elixir was defective and unreasonably dangerous to foreseeable users and consumers because.

a The product contained manufacturing and design defects in that it contained PPA, which can cause hypertension, strokes, heart attacks, seizures, and death, among other things

b The product was not safe as designed, taking into account that the foreseeable risks involved in its use outweighed its utility and therapeutic benefits

c The product was marketed and promoted for use as an over-the-counter decongestant to treat symptoms of cold and flu, and by design and formulation, carried an unreasonable and unnecessary risk of serious injury and death The risk of harm far outweighed the benefit of use.

d The medication was insufficiently and inadequately tested, yet the defendants promoted them as being pharmaceutically tested and safe for use

e. The product was not safe due to inadequate and defective instructions and warnings at the time the products left the possession of the defendants The warnings were inadequate to fully apprise the user of the full nature and extent of the risks and dangerous side effects associated with the use,

f The product was marketed and promoted for use as an over-the-counter medication, safe for use without the supervision of a physician, when it was not

15 At the time the Rite Aid Cough and Cold DM Elixir left the control of the defendants, the defendants knew, or in light of reasonably available knowledge or in the exercise of reasonable care should have known about the danger that caused the damages and injuries for which recovery is sought, and that the ordinary user or consumer would not realize its dangerous condition

16. At all relevant times hereto, there existed a feasible design alternative that would

to a reasonable probability have prevented the injuries and damages to the Plaintiffs

17 As a direct and proximate result of the actions and inactions of the defendants as set forth above, Plaintiffs have sustained injuries and are entitled to damages enumerated below

18 The defendants' actions and inactions as set forth above were intentional and deliberate, and Plaintiffs are also entitled to punitive damages

WHEREFORE, THE ABOVE PREMISES CONSIDERED, Plaintiffs demand judgment of the defendants, for compensatory and punitive damages in an amount determined by the jury to be necessary and just

COUNT TWO

Failure to Warn

19 Plaintiffs adopt and incorporate by reference all the above allegations

20 Rite Aid Cough and Cold DM Elixir contained PPA, which can be unreasonably dangerous, even when used for its intended purpose, i e , as a nasal decongestant and cold remedy

21. The defendants, as manufacturers and sellers of pharmaceutical drugs, are held to the level of knowledge of an expert in the field, and further, the defendants had knowledge of the dangerous risks and side effects of the medications.

22 Plaintiffs did not have the same knowledge as the defendants and no adequate warning was communicated to them.

23. The defendants had a continuing duty to warn consumers, including the Plaintiffs, of its products, and the risks and dangers associated with them, and negligently and/or wantonly breached their duty as follows

a Failed to include adequate warnings with the medications that would alert Plaintiffs and other consumers to the dangerous risks and serious side effects of the PPA medications

b Failed to provide adequate post-marketing warnings and instructions after the defendants knew or should have known of the significant risks of stroke and injury from the use of PPA medications

c Failed to adequately warn Plaintiffs that Rite Aid Cough and Cold DM Elixir should not be used in conjunction with other medicines containing PPA or stimulants such as caffeine

d Failed to warn Plaintiffs to consult with a physician before using the PPA medications

e Failed to inform Plaintiffs that the medications had not been adequately and thoroughly tested for safety as a decongestant

24 As a direct and proximate result of the actions and inactions of the defendants as set forth above, Plaintiffs have sustained injuries and damages as listed below

WHEREFORE, THE ABOVE PREMISES CONSIDERED, Plaintiffs demand judgment of the defendants for compensatory and punitive damages in an amount determined by the jury to be necessary and just

COUNT THREE

Breach of Warranty of Merchantability

25 Plaintiffs adopt and incorporate by reference all the above allegations.

26 When the defendants placed the Rite Aid Cough and Cold DM Elixir into the stream of commerce, they knew that the medicine would be used as a nasal decongestant and

cold remedy, and expressly and impliedly warranted to the Plaintiffs that use of these medicines was a safe and acceptable means of relieving nasal decongestion and cold symptoms

27 Plaintiffs reasonably relied upon the expertise, skill, judgment and knowledge of the defendants and upon the express and/or implied warranty that the Rite Aid Cough and Cold DM Elixir was of merchantable quality and fit for use to relieve nasal decongestion and cold symptoms

28 The Rite Aid Cough and Cold DM Elixir was not of merchantable quality and was not safe or fit for the intended use because it was unreasonably dangerous and unfit for the ordinary purposes for which it was used, in that they caused serious injuries and damages The medication breached the warranties because it was unduly dangerous in expected use and did cause undue injuries to the Plaintiffs

29 As a direct and proximate result of the breach of warranties by the defendants, Plaintiffs have sustained injuries and damages as set forth below

WHEREFORE, THE ABOVE PREMISES CONSIDERED, Plaintiffs demand judgment of the defendants for compensatory damages in an amount determined by the jury to be necessary and just

COUNT FOUR

Negligence

30. Plaintiffs adopt and incorporate by reference all the allegations above

31. The defendants negligently manufactured, designed, tested, researched and developed, labeled, packaged, distributed, promoted, marketed, advertised, and sold, in the state of Mississippi, Rite Aid Cough and Cold DM Elixir medications containing PPA

32. At all times material hereto, the defendants had a duty to the Plaintiffs to exercise reasonable care in the design, manufacture, testing, research and development, processing, advertising, marketing, labeling, packaging, distribution, promotion and sale of their medications containing PPA

33. The defendants breached their duty and were negligent in their actions, misrepresentations, and omissions toward the Plaintiffs in the following ways

a Failed to use reasonable care to test the PPA medications which, if properly performed, would have shown that PPA had serious side effects, including, but not limited to, risk of stroke,

b Failed to use reasonable care to give warnings and instructions with the medications

c Failed to use reasonable care to design and manufacture a decongestant medication safe for its intended use

d Failed to use reasonable care in the marketing and promotion of the medications

34 The defendants knew or should have known that PPA medications caused unreasonably dangerous risks and serious side effects of which Plaintiffs would not be aware The defendants nevertheless manufactured, advertised, marketed, sold and distributed the drug knowing that there were safer methods and products for nasal congestion and cold symptom relief.

35 As a direct and proximate result of the negligent actions and inactions of the defendants as set forth above, Plaintiffs have sustained injuries and damages as set forth below

WHEREFORE, THE ABOVE PREMISES CONSIDERED, Plaintiffs demand judgment of the defendants for compensatory damages in an amount determined by the jury to be necessary and just

COUNT FIVE

Wantonness

36. Plaintiffs adopt and incorporate by reference all the allegations above

37 The defendants wantonly and recklessly manufactured, designed, tested, researched and developed, labeled, packaged, distributed, promoted, marketed, advertised, and sold, in the state of Mississippi, Rite Aid Cough and Cold DM Elixir containing PPA

38 At all times material hereto, the defendants had a duty to each of the Plaintiffs to exercise reasonable care in the design, manufacture, testing, research and development, processing, advertising, marketing, labeling, packaging, distribution, promotion and sale of its medications containing PPA

39 The defendants breached their duty and were wanton and reckless in their actions, misrepresentations, and omissions toward the Plaintiffs in the following ways:

a. Failed to use reasonable care to test the PPA medications which, if properly performed, would have shown that PPA had serious side effects, including, but not limited to, risk of stroke,

b. Failed to use reasonable care to give warnings and instructions with the medications

c Failed to use reasonable care to design and manufacture a decongestant medication safe for its intended use.

d Failed to use reasonable care in the marketing and promotion of the medications

40 The defendants knew that PPA medications caused unreasonably dangerous risks and serious side effects of which Plaintiffs would not be aware. The defendants nevertheless manufactured, advertised, marketed, sold and distributed the drug knowing that there were safer methods and products for nasal congestion and cold symptom relief

41 As a direct and proximate result of the wanton and reckless actions and inactions of the defendants as set forth above, Plaintiffs have sustained injuries and damages as set forth below

WHEREFORE, THE ABOVE PREMISES CONSIDERED, Plaintiffs demand judgment of the defendants, for compensatory and punitive damages in an amount determined by the jury to be necessary and just.

COUNT SIX

Fraud, Misrepresentation and Suppression

42. Plaintiffs adopt and incorporate by reference all the allegations above

43. The defendants fraudulently, intentionally and/or negligently misrepresented to the Plaintiffs, the FDA, and general public, the safety of PPA products and/or fraudulently, intentionally and/or negligently concealed material including adverse information regarding the safety of PPA

44 The defendants made misrepresentations and actively concealed adverse information at a time when the defendants knew, or should have known, that PPA had defects, dangers, and characteristics that were other than what the defendants had represented to the FDA, and the consuming public, including the Plaintiffs Specifically, the defendants misrepresented to Plaintiffs, the FDA, and the consuming public that·

a The PPA medications, when used as recommended, were safe to use for relief of symptoms of cold and flu in children and adults

b The PPA medications had been pharmaceutically tested and were safe for use as over-the-counter medications without the supervision of a physician

c The PPA medications, and PPA itself, were fully and adequately tested

d The PPA medications had no serious adverse effects

e The PPA medications were safe and effective

45. The defendants knew or should have known that these representations were false and that Plaintiffs would rely on them, leading to their use of the PPA medications The defendants knew that the Rite Aid Cough and Cold DM Elixir were sold without a prescription, and without the direct aid and advice of a physician, and that Plaintiffs would be relying on information, advertisements and statements made by the defendants about the use, safety and efficacy of these PPA products

46. At the time of the defendants' fraudulent misrepresentations and active concealment, Plaintiffs were unaware of the falsity of the statements being made and believed them to be true

47 Plaintiffs justifiably relied on and/or were induced by the misrepresentations made by the defendants of the safety and use of PPA products.

48 The defendants concealed the truth from Plaintiffs and the consuming public about the real safety and risks of PPA medications.

49 The defendants had a post-sale duty to warn Plaintiffs and the public about the potential risks and complications associated with medications containing PPA in a timely manner

50. The misrepresentations and active concealment by the defendants constitutes a continuing tort against Plaintiffs

51 As a direct and proximate result of the misrepresentations and concealment of the defendants as set forth above, Plaintiffs have sustained injuries and damages set forth below

WHEREFORE, THE ABOVE PREMISES CONSIDERED, Plaintiffs demand judgment of the defendants, for compensatory and punitive damages in an amount determined by the jury to be necessary and just

CLAIM FOR DAMAGES

Plaintiff, Nancy Lee Montgomery, has sustained injuries and damages as set out herein, and does make claim for these

a Reasonable and necessary health care expenses incurred in the past,

b. Reasonable and necessary health care expenses which will be incurred in the future,

c. Physical pain and suffering in the past;

d. Physical pain and suffering which will be endured in the future,

e. Mental anguish suffered in the past;

f Mental anguish which will be endured in the future,

g. Physical disability and impairment, past and future,

h. Lost wages in the past and future loss of wage earning capacity, and

i All other incidental and consequential damages, fees and expenses

Plaintiff, Louis D. Montgomery, has sustained the loss of companionship, services and intimacy of his spouse as a direct and proximate result of the physical and mental injuries suffered by his spouse, Nancy Lee Montgomery.

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205-980-6065
205-980-6165 (fax)

OF COUNSEL
LEILA H. WATSON
CORY, WATSON, CROWDER & DEGARIS, P C
2131 Magnolia Avenue
Birmingham, Alabama 35205
205-328-2200
205-324-7896 (fax)

CERTIFICATE OF SERVICE

I do hereby certify that on this the 3rd day of ~~February~~ March, 2003, I served a copy of the foregoing by placing the same in the U.S Mail, first-class postage affixed, addressed to the following:

Robert E. Briggs, Esquire
Daniel Coker Horton & Bell
P O Box 416
Gulfport, MS 39502

DENNIS R WEAVER

Please Serve The defendant as Follows:

Alpharma, Inc
Resident Agent: Corporation Service Company
506 S. President Street
Jackson, MS 39201-5301

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

NANCY LEE MONTGOMERY, and LOUIS D. MONTGOMERY	)
Plaintiffs,	)
v.	)
RITE AID CORPORATION; and "A", whether singular or plural being presently unknown individuals, entities and/or corporations engaged in the business of, inter alia, manufacturing, promoting, distributing and/or selling, for profit, over-the-counter and/or prescription pharmaceutical products containing the active ingredient PPA with the Rite Aid Corporation name on the label.	)
Defendants.	)

1:02CV764BR

COMPLAINT

STATEMENT OF JURISDICTION

This Court has jurisdiction over this matter pursuant to 28 U S C Section 1332, for diversity of citizenship and Plaintiff claims an amount in controversy exceeding $75,000 00

PARTIES

1 Plaintiff, Nancy Lee Montgomery, is over the age of 19 years, and is a resident of Moss Point, Jackson County, Mississippi Plaintiff, Nancy Lee Montgomery suffered a ruptured aneurysm and subarachnoid hemorrhage on December 20, 2000, within 12 hours of taking Rite Aid Cold & Cough DM Elixir

2 Plaintiff, Louis D Montgomery, is over the age of 19 years, and is a resident of Moss Point, Jackson County, Mississippi. Plaintiff Louis D Montgomery is, and was at all times relevant hereto, the spouse of Plaintiff, Nancy Lee Montgomery

3 The defendant, Rite Aid Corporation ("Rite-Aid") is a corporation of the state of Delaware. with its principal place of business in Pennsylvania. At all relevant times herein, Rite-Aid was in the business of promoting, selling, advertising, marketing and distributing products containing Phenylpropanolamine ("PPA") The defendant does business in Mississippi and at all relevant times hereto, marketed, promoted, warranted and sold its products containing PPA in Mississippi

4 Fictitiously described defendant "A", whose identity is unknown to the Plaintiffs at this time, or if the name is known to Plaintiffs, the identity as proper party is not known to the Plaintiffs at this time, and the true names will be substituted by amendment when ascertained At all times relevant hereto, the defendant A was in the business of designing, promoting, testing, researching and developing, manufacturing and distributing Rite Aid Cold & Cough DM Elixir containing Phenylpropanolamine ("PPA") The defendant did business in Mississippi and at all relevant times hereto, marketed, manufactured, promoted, warranted and sold Rite Aid Cold & Cough DM Elixir products containing PPA in Mississippi

FACTS

5 At all times material to this action, the defendants engaged in the design, manufacture, testing, research and development, marketing, advertising, distribution and sales of non-prescription, pharmaceutical products. including cold, flu, and sinus products containing PPA The defendants designed, tested. researched and developed, manufactured, marketed, advertised, distributed and/or sold Rite Aid Cough and Cold DM Elixir products containing PPA, which were ingested by Plaintiff

6 At all times material to this action, the defendants have known or should have known that PPA can cause severe hypertension and vasoconstriction of small blood vessels, which can lead to serious, life threatening consequences, including hypertension, seizure, heart attack, hypertensive encephalopathy, agitation, psychosis, hemorrhagic stroke, ischemic stroke, neurological problems and symptoms cardiac problems, and death Despite this knowledge, for years, the defendants used PPA in many non-prescriptions, over-the-counter medications The defendants marketed and advertised their products to the general public and to the medical community as being safe and effective for their stated purposes.

7. The defendants knew or should have known that the general public considered over-the-counter medications, like the Rite Aid Cough and Cold DM Elixir products to be innocuous and safe to use without the supervision of a doctor because they could be purchased and used without a prescription

8 The defendant, Rite Aid, voluntarily withdrew all its PPA products from the market on November 6, 2000, in response to a request from the Food and Drug Administration to do so

9 Throughout the time period that the defendants manufactured, distributed, marketed and sold products containing PPA, they had been aware of the health risk and adverse effects of PPA The defendants have concealed this information from Plaintiffs and from the general public Plaintiffs did not discover and could not have discovered this information until the voluntary withdrawal of PPA medications at the recommendation of the Food and Drug Administration Because of the intentional conduct of the defendants and the pharmaceutical industry in general to conceal important information about the dangerous risks of PPA

e The product was not safe due to inadequate and defective instructions and warnings at the time the products left the possession of the defendants The warnings were inadequate to fully apprise the user of the full nature and extent of the risks and dangerous side effects associated with the use,

e The product was marketed and promoted for use as an over-the-counter medication, safe for use without the supervision of a physician, when it was not

13 At the time the Rite Aid Cough and Cold DM Elixir left the control of the defendants, the defendants knew, or in light of reasonably available knowledge or in the exercise of reasonable care should have known about the danger that caused the damages and injuries for which recovery is sought, and that the ordinary user or consumer would not realize its dangerous condition

14 At all relevant times hereto, there existed a feasible design alternative that would to a reasonable probability have prevented the injuries and damages to the Plaintiffs

15 As a direct and proximate result of the actions and inactions of the defendants as set forth above, Plaintiffs have sustained injuries and are entitled to damages enumerated below

16 The defendants' actions and inactions as set forth above were intentional and deliberate, and Plaintiffs are also entitled to punitive damages

WHEREFORE, THE ABOVE PREMISES CONSIDERED. Plaintiffs demand judgment of the defendants, for compensatory and punitive damages in an amount determined by the jury to be necessary and just

COUNT TWO

Failure to Warn

17 Plaintiffs adopt and incorporate by reference all the above allegations

18 Rite Aid Cough and Cold DM Elixir contained PPA, which can be unreasonably dangerous. even when used for its intended purpose, i e . as a nasal decongestant and cold remedy

19 The defendants, as manufacturers and sellers of pharmaceutical drugs, are held to the level of knowledge of an expert in the field, and further. the defendants had knowledge of the dangerous risks and side effects of the medications

20 Plaintiffs did not have the same knowledge as the defendants and no adequate warning was communicated to them

21 The defendants had a continuing duty to warn consumers, including the Plaintiffs, of its products, and the risks and dangers associated with them, and negligently and/or wantonly breached their duty as follows

a Failed to include adequate warnings with the medications that would alert Plaintiffs and other consumers to the dangerous risks and serious side effects of the PPA medications

b Failed to provide adequate post-marketing warnings and instructions after the defendants knew or should have known of the significant risks of stroke and injury from the use of PPA medications

c Failed to adequately warn Plaintiffs that Rite Aid Cough and Cold DM Elixir should not be used in conjunction with other medicines containing PPA or stimulants such as caffeine.

d Failed to warn Plaintiffs to consult with a physician before using the PPA medications

e Failed to inform Plaintiffs that the medications had not been adequately and thoroughly tested for safety as a decongestant

22 As a direct and proximate result of the actions and inactions of the defendants as set forth above, Plaintiffs have sustained injuries and damages as listed below

WHEREFORE, THE ABOVE PREMISES CONSIDERED, Plaintiffs demand judgment of the defendants for compensatory and punitive damages in an amount determined by the jury to be necessary and just

COUNT THREE

Breach of Warranty of Merchantability

23 Plaintiffs adopt and incorporate by reference all the above allegations

24 When the defendants placed the Rite Aid Cough and Cold DM Elixir into the stream of commerce, they knew that the medicine would be used as a nasal decongestant and cold remedy, and expressly and impliedly warranted to the Plaintiffs that use of these medicines was a safe and acceptable means of relieving nasal decongestion and cold symptoms

25 Plaintiffs reasonably relied upon the expertise, skill, judgment and knowledge of the defendants and upon the express and/or implied warranty that the Rite Aid Cough and Cold DM Elixir was of merchantable quality and fit for use to relieve nasal decongestion and cold symptoms

26 The Rite Aid Cough and Cold DM Elixir was not of merchantable quality and was not safe or fit for the intended use because it was unreasonably dangerous and unfit for the ordinary purposes for which it was used, in that they caused serious injuries and damages The

medication breached the warranties because it was unduly dangerous in expected use and did cause undue injuries to the Plaintiffs

27 As a direct and proximate result of the breach of warranties by the defendants, Plaintiffs have sustained injuries and damages as set forth below

WHEREFORE, THE ABOVE PREMISES CONSIDERED, Plaintiffs demand judgment of the defendants for compensatory damages in an amount determined by the jury to be necessary and just

COUNT FOUR

Negligence

28 Plaintiffs adopt and incorporate by reference all the allegations above

29 The defendants negligently manufactured, designed, tested, researched and developed labeled, packaged, distributed, promoted, marketed, advertised, and sold, in the state of Mississippi, Rite Aid Cough and Cold DM Elixir medications containing PPA

30 At all times material hereto, the defendants had a duty to the Plaintiffs to exercise reasonable care in the design. manufacture, testing, research and development, processing, advertising, marketing. labeling, packaging, distribution, promotion and sale of their medications containing PPA

31 The defendants breached their duty and were negligent in their actions, misrepresentations, and omissions toward the Plaintiffs in the following ways

a Failed to use reasonable care to test the PPA medications which, if properly performed, would have shown that PPA had serious side effects, including, but not limited to risk of stroke,

b Failed to use reasonable care to give warnings and instructions with the medications

c Failed to use reasonable care to design and manufacture a decongestant medication safe for its intended use

d Failed to use reasonable care in the marketing and promotion of the medications

32 The defendants knew or should have known that PPA medications caused unreasonably dangerous risks and serious side effects of which Plaintiffs would not be aware The defendants nevertheless manufactured, advertised, marketed, sold and distributed the drug knowing that there were safer methods and products for nasal congestion and cold symptom relief

33 As a direct and proximate result of the negligent actions and inactions of the defendants as set forth above, Plaintiffs have sustained injuries and damages as set forth below

WHEREFORE, THE ABOVE PREMISES CONSIDERED, Plaintiffs demand judgment of the defendants for compensatory damages in an amount determined by the jury to be necessary and just

COUNT FIVE

Wantonness

34 Plaintiffs adopt and incorporate by reference all the allegations above

35 The defendants wantonly and recklessly manufactured, designed tested, researched and developed, labeled, packaged, distributed, promoted, marketed, advertised, and sold in the state of Mississippi, Rite Aid Cough and Cold DM Elixir containing PPA

36 At all times material hereto, the defendants had a duty to each of the Plaintiffs to exercise reasonable care in the design, manufacture, testing, research and development,

processing, advertising, marketing, labeling, packaging, distribution, promotion and sale of its medications containing PPA

37 The defendants breached their duty and were wanton and reckless in their actions, misrepresentations, and omissions toward the Plaintiffs in the following ways

a Failed to use reasonable care to test the PPA medications which, if properly performed, would have shown that PPA had serious side effects, including, but not limited to, risk of stroke,

b Failed to use reasonable care to give warnings and instructions with the medications

c Failed to use reasonable care to design and manufacture a decongestant medication safe for its intended use

d Failed to use reasonable care in the marketing and promotion of the medications

38 The defendants knew that PPA medications caused unreasonably dangerous risks and serious side effects of which Plaintiffs would not be aware The defendants nevertheless manufactured, advertised, marketed, sold and distributed the drug knowing that there were safer methods and products for nasal congestion and cold symptom relief

39 As a direct and proximate result of the wanton and reckless actions and inactions of the defendants as set forth above, Plaintiffs have sustained injuries and damages as set forth below

WHEREFORE, THE ABOVE PREMISES CONSIDERED, Plaintiffs demand judgment of the defendants, for compensatory and punitive damages in an amount determined by the jury to be necessary and just

COUNT SIX

Fraud, Misrepresentation and Suppression

40 Plaintiffs adopt and incorporate by reference all the allegations above

41 The defendants fraudulently, intentionally and/or negligently misrepresented to the Plaintiffs, the FDA. and general public, the safety of PPA products and/or fraudulently, intentionally and/or negligently concealed material including adverse information regarding the safety of PPA

42 The defendants made misrepresentations and actively concealed adverse information at a time when the defendants knew, or should have known, that PPA had defects, dangers, and characteristics that were other than what the defendants had represented to the FDA, and the consuming public, including the Plaintiffs Specifically, the defendants misrepresented to Plaintiffs, the FDA, and the consuming public that

a The PPA medications, when used as recommended, were safe to use for relief of symptoms of cold and flu in children and adults.

b The PPA medications had been pharmaceutically tested and were safe for use as over-the-counter medications without the supervision of a physician

c The PPA medications, and PPA itself, were fully and adequately tested

d The PPA medications had no serious adverse effects

e The PPA medications were safe and effective

43 The defendants knew or should have known that these representations were false and that Plaintiffs would rely on them, leading to their use of the PPA medications The defendants knew that the Rite Aid Cough and Cold DM Elixir were sold without a prescription, and without the direct aid and advice of a physician. and that Plaintiffs would be relying on

information, advertisements and statements made by the defendants about the use, safety and efficacy of these PPA products

44 At the time of the defendants' fraudulent misrepresentations and active concealment, Plaintiffs were unaware of the falsity of the statements being made and believed them to be true

45 Plaintiffs justifiably relied on and/or were induced by the misrepresentations made by the defendants of the safety and use of PPA products

46 The defendants concealed the truth from Plaintiffs and the consuming public about the real safety and risks of PPA medications

47 The defendants had a post-sale duty to warn Plaintiffs and the public about the potential risks and complications associated with medications containing PPA in a timely manner

48 The misrepresentations and active concealment by the defendants constitutes a continuing tort against Plaintiffs

49 As a direct and proximate result of the misrepresentations and concealment of the defendants as set forth above, Plaintiffs have sustained injuries and damages set forth below

WHEREFORE, THE ABOVE PREMISES CONSIDERED, Plaintiffs demand judgment of the defendants, for compensatory and punitive damages in an amount determined by the jury to be necessary and just

CLAIM FOR DAMAGES

Plaintiff Nancy Lee Montgomery, has sustained injuries and damages as set out herein, and does make claim for these

a Reasonable and necessary health care expenses incurred in the past,

b Reasonable and necessary health care expenses which will be incurred in the future,

c. Physical pain and suffering in the past,

d Physical pain and suffering which will be endured in the future,

e Mental anguish suffered in the past,

f Mental anguish which will be endured in the future;

g Physical disability and impairment, past and future.

h Lost wages in the past and future loss of wage earning capacity, and

i. All other incidental and consequential damages, fees and expenses

Plaintiff, Louis D. Montgomery, has sustained the loss of companionship, services and intimacy of his spouse as a direct and proximate result of the physical and mental injuries suffered by his spouse, Nancy Lee Montgomery

DENNIS R WEAVER (100555)
Attorney For Plaintiffs
CORY, WATSON, CROWDER & DEGARIS P C
2131 Magnolia Avenue
Birmingham, Alabama 35205
(205) 328-2200

PLAINTIFFS DEMAND A TRIAL OF ALL ISSUES BY STRUCK JURY.

DENNIS R. WEAVER

Please Serve The defendant as Follows:

RITE AID CORP
C T CORPORATION
631 LAKELAND EAST DR
FLOWOOD, MS 39232

(Principle address)
30 Hunter Lane,
Camp Hill, Pennsylvania 17011

MINUTE ENTRY ORDER

FORM #3

DOCKET # 1:02 cv 764 BrR

DATE: 04/08/03

SHORT TITLE: Montgomery vs B.te Ad Corp

JUDGE: Roper

TYPE ACTIVITY

PRETRIAL MOTION ✓ IN LIMINE MOTION ____ POST TRIAL MOTION ___

ACTION TAKEN

(1) **Motion:** Ore Tenus___ Written✓ by Pltf✓ Deft___ Ct___

Request:

Motion to file First Amended Complaint

Ruling:

Granted

ORDERED THIS THE 8th DAY OF April, 2003.

UNITED STATES MAGISTRATE JUDGE